Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

BRETT KOUPAL, by and through his mother and next friend, RENEE KOUPAL,

Petitioners,

v.

SIOUX FALLS SCHOOL DISTRICT,

Respondent.

Petition For A Writ Of Certiorari To The South Dakota Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. THE SOUTH DAKOTA SUPREME COURT ERRED AS A MATTER OF LAW IN HOLDING THAT TEACHER TRAINING CANNOT BE A "RELATED SERVICE" UNDER THE INDIVIDUALIZED EDUCATION PROGRAM OF BRETT KOUPAL. THIS DECISION CONFLICTS WITH THE DECISION OF THE UNITED STATES SUPREME COURT.

II. THE SOUTH DAKOTA SUPREME COURT ERRED AS A MATTER OF LAW IN HOLDING THAT TEACHER TRAINING COULD NOT BE INCLUDED IN THE INDIVIDUALIZED EDUCATION PROGRAM OF BRETT KOUPAL. THIS DECISION CONFLICTS WITH DECISIONS FROM ALL OTHER JURISDICTIONS INCLUDING THE FEDERAL CIRCUIT COURTS OF APPEAL.

III. THE IMPORTANCE OF THE ISSUES INVOLVED IN THIS CASE WARRANT THE EXERCISE OF THIS COURT'S DISCRETIONARY JURISDICTION. ALLOWING THE SOUTH DAKOTA SUPREME COURT'S DECISION TO EXCLUDE TEACHER TRAINING FROM STUDENTS' INDIVIDUALIZED EDUCATION PROGRAMS WILL UNDERMINE THEIR RIGHTS TO RECEIVE A FREE APPROPRIATE PUBLIC EDUCATION.

IV. THE IMPORTANCE OF THE FEDERAL QUESTION INVOLVED IN THIS CASE WARRANTS THE EXERCISE OF THIS COURT'S DISCRETIONARY JURISDICTION. THE NARROW INTERPRETATION THE SUPREME COURT OF SOUTH DAKOTA GIVES TO THE IDEA AND THE APPLICABLE FEDERAL REGULATIONS UNDERMINES THE FUNDAMENTAL PURPOSE OF THE ACT AND IS AT ODDS WITH A WELL-ESTABLISHED CONSTRUCTION GIVEN THE STATUTE BY THE ADMINISTRATIVE

QUESTIONS PRESENTED – Continued

AGENCY CHARGED WITH ITS ENFORCEMENT AND COMMON PRACTICE OF SCHOOL DISTRICTS NATIONWIDE.

PARTIES TO THE PROCEEDING

The parties to the proceedings below were the petitioner, Renee Koupal, on behalf of her son, Brett Koupal, and the respondent, Sioux Falls School District.

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Petition For A Writ Of Certiorari To The South Dakota Supreme Court

PETITION FOR WRIT OF CERTIORARI

Petitioners herein respectfully pray that a writ of certiorari issue to review the judgment and opinion of the South Dakota Supreme Court entered in this action on December 21, 1994.

OPINIONS BELOW

The opinion of the South Dakota Supreme Court is dated December 21, 1994 and reported at 22 IDELR 26 (S.D. 1994). It is reprinted at pages 1a-12a of the appendix to this petition. The South Dakota Supreme Court's Order Denying Rehearing, dated January 25, 1995, is unreported

and is reprinted at page 34a of the appendix to this petition. The transcript of the Circuit Court's oral opinion, dated November 15, 1993, is unreported and is reprinted at pages 13a-22a of the appendix to this petition. The Judgment entered by the Circuit Court, dated December 17, 1993, is not reported and is reprinted at pages 23a-24a of the appendix to this petition. The Findings of Fact, Conclusions of Law and Decision of the administrative hearing officer is dated April 15, 1993 and is reported at 19 IDELR 796 (SEA S.D. 1993). It is reprinted at pages 25a-33a of the appendix to this petition.

JURISDICTION

The South Dakota Supreme Court's Decision is dated December 21, 1994. The South Dakota Supreme Court's Order Denying Rehearing was entered on January 25, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant sections of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1485 (1991), its accompanying regulations, 34 C.F.R. §§ 300.1-300.754 (1991), and 29 U.S.C. § 794 of the Rehabilitation Act of 1973, as amended, are set forth in the Appendix. App. 35a-73a.

STATEMENT OF THE CASE

The decision below concerns the nature and extent of a state's obligation under the IDEA to provide a free appropriate public education to all children with disabilities. This Court has addressed the application of the IDEA in two cases that are impacted by the decision of the South Dakota Supreme Court: The ruling in *Board of Educ. of the Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176 (1982), which sets out the basic standard for determining whether a state or school district has provided a child with a free appropriate public education; and *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984), which sets out the standard for determining whether a particular service is a "related service" under the IDEA.

1. *The Statutory Scheme*: The Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1485 (1991) (formerly titled the Education of the Handicapped Act), imposes both substantive and procedural obligations on states as a condition of federal funding to aid in educating children with disabilities. Substantively, states receiving federal funds are required to provide such children with a "free appropriate public education" ("FAPE") at public expense and under public supervision and direction. 20 U.S.C. § 1412(1). Under the IDEA, the educational and related services must be provided at public expense, meet the standards of the state educational agency, and be provided in conformity with an "individualized education program" ("IEP") allowing it to be tailored to the unique needs of each child. 20 U.S.C. § 1401(a)(18). The

IEP is prepared at a meeting between a qualified representative of the local education agency, the child's teacher, the child's parents or guardian, and where appropriate, the child. 20 U.S.C. § 1401(a)(20).

By statute, the IEP consists of an agreed statement of (1) the child's "present levels of educational performance"; (2) "annual goals, including short-term instructional objectives"; (3) "specific educational services to be provided"; (4) a "date for initiation and anticipated duration" of services; (5) "needed transition services for students . . . including, when appropriate, a statement of the interagency responsibilities . . . "; and (6) "objective criteria and evaluation procedures" for determining whether the objectives are being met. 20 U.S.C. § 1400(a)(20)(A-F). The IEP is the only vehicle envisioned by the IDEA to assure that each child with a disability receives a free appropriate public education under the IDEA.

Procedurally, the IDEA requires the state to provide "an opportunity to present complaints with respect to *any* matter relating to . . . the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(1)(E) (emphasis added). Upon receipt of a complaint, the local education agency or state education agency must provide parents with a hearing before an impartial hearing officer. 20 U.S.C. § 1415(b)(2). This decision is reviewable in either state court or federal district court through a two-part inquiry. 20 U.S.C. § 1415(e)(2). The Court must look first at whether the state complied with the procedures set forth in the Act, and, second, at whether the

"individualized education program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits[.]" *Rowley*, 458 U.S. at 206-07.

2. *Facts*: Brett Koupal is a seven-year-old child with severe autism. Due to his disability, Brett requires and receives special education services from the Sioux Falls School District. The School District uses TEACCH methodology in teaching Brett. There is no dispute that this is the most appropriate methodology to use with Brett. TEACCH is a program of instruction targeted for use with children with autism. According to the Sioux Falls School District's Special Services Director, Karen Roth, if Brett does not have a teacher sufficiently trained in TEACCH, *he will regress*. Brett's former teacher, Carla Miller, also testified that it would be *very detrimental* to Brett and *he would regress* if he had a teacher without TEACCH training. For that reason, Brett's IEP states that if Brett's regular classroom instructor and her educational aide are going to be absent, Brett will remain home rather than have an untrained person attempt to implement his IEP.

Brett is nonverbal. He uses facilitated communication as his primary means of communication. Everyone who facilitates with Brett requires special training. The Sioux Falls School District has had Brett's home base classroom teacher and speech therapist trained in facilitated communication. Brett's current IEP contains *specific staff training language* in the area of facilitated communication. The School District has stipulated that this language is part of Brett's current IEP, but it would remove the staff training language on the TEACCH methodology.

The State of South Dakota offers a five-day introductory course in TEACCH twice each June, training twenty-five persons per course, at a cost of only $50 to attend. Brett's previous two IEPs contained typed pages, which had been submitted by Renee Koupal as an equal participant in the development of the IEP, with the heading "Other Related Services" that contained, among several other things, language that Brett's home base teacher would receive, at the very least, the five-day TEACCH training course prior to working with him.

Jessica Beavers, Brett's teacher during the 1991-92 school year, testified that she had received the five-day TEACCH training prior to working with Brett. She further testified that the five-day training was essential to enable her to confer educational benefit to Brett, that the TEACCH training provided her with a good start in teaching Brett, but that it was not sufficient and she needed additional help along the way. She testified that it was her understanding that the TEACCH training requirement was part of Brett's "official" IEPs.

Carla Miller was Brett's teacher during the summer of 1991. She received the five-day TEACCH training in 1986 and later attended a six-week course in North Carolina. She testified that the five-day TEACCH training course would be the minimum amount of training necessary to work with Brett based on his unique educational needs. She also testified that if a teacher is not able to pick up the information in this manner it can be harmful to the child.

Tom Stanage is a psychologist who has extensive experience in the area of autism, is an expert in the field

of autism, and in implementing the TEACCH methodology. Dr. Stanage testified that a teacher must have received a minimum level of competencies regarding autism before acquiring the necessary background to teach a child with autism. Although those competencies are covered in the five-day course, Dr. Stanage stated that the training provides a "pretty minimal exposure to those competencies." He indicated that the five-day course provides a minimal amount of training for a teacher prior to working with a child with autism.

When Brett's IEP team met on December 11, 1992, to revise his IEP, the School District attempted to change the IEP by removing the language requiring that Brett's teacher receive, at the very least, the five-day TEACCH course prior to working with him. The School District produced no new assessment information to justify this change in Brett's IEP.

Renee Koupal disagreed with the School District's attempt to remove the language requiring teacher training from Brett's IEP and requested a due process hearing on January 28, 1993 per 20 U.S.C. Section 1415(b)(1)(E) to address whether federal law (IDEA) allowed language regarding teacher training to remain in Brett's IEP. The administrative hearing was held March 26, 1993. The Administrative Hearing Officer issued his Findings of Fact, Conclusions of Law and Decision on April 5, 1993, ruling in favor of the parents. App. 25a-33a. The Hearing Officer held that teacher training could properly be contained in an IEP as a "related service" and that Brett required this language in his IEP in order to receive a free appropriate public education. App. 31a-32a. He also held, based on 34 C.F.R. § 300.343(d), that because identical

language had been contained in Brett's previous two IEPs, the School District was estopped from removing the language because the School District had not demonstrated that Brett's needs had changed. App. 33a.

3. *Judicial Proceedings*: The School District filed a Notice of Appeal to the Circuit Court of South Dakota, Sixth Judicial Circuit, on May 6, 1993. Renee Koupal filed an Answer and Counterclaim on May 28, 1993. The School District filed a Reply to Counterclaim on July 1, 1993. The Circuit Court, the Honorable Steven L. Zinter, denied the School District's Motion to Present Additional Evidence on July 30, 1993. Judge Zinter heard oral argument on November 15, 1993 and entered an oral Decision on the record reversing the Decision of the Hearing Officer. App. 13a-22a. Judge Zinter entered his Judgment on December 17, 1993. App. 23a-24a. Notice of Entry of Judgment was entered and served on January 4, 1994.

In reversing the Decision of the administrative hearing officer, the Circuit Court disagreed with the hearing officer that teacher training can be a "related service" under federal law (IDEA), but rather held that it is a "direct service" under the IDEA. App. 15a. The Circuit Court stated that language which would require competency in the TEACCH methodology could be contained in an IEP. App. 15a, 19a. The Circuit Court reversed the Decision of the hearing officer because it did not "believe the District can be forced to include in an IEP that Brett's teacher will have a particular course, that being the five-day TEACCH course that is referred to here." App. 19a. The Circuit Court also held that the language contained

in Brett's previous IEPs was not material or relevant. App. 19a.

Renee Koupal filed a timely Notice of Appeal to the South Dakota Supreme Court on March 3, 1994. She agreed with the Circuit Court's ruling that under the IDEA an IEP could contain language that would require teacher competency in the TEACCH methodology, but disagreed with the Circuit Court's reversal of the administrative hearing officer's Decision and removal of crucial minimal teacher training requirements from Brett's IEP.

The South Dakota Supreme Court affirmed the oral Decision of the Circuit Court. App. 1a-12a. The Court concurred with the Circuit Court that teacher training cannot be a "related service" under the IDEA. App. 9a. However, unlike the Circuit Court's ruling that teacher training is a direct service and that Brett's IEP could contain teacher competency language, the South Dakota Supreme Court held that because teacher training is not a related service, it could not be contained anywhere in Brett's IEP. App. 10a. The Court also concurred with the Circuit Court that the fact that identical language was contained in Brett's previous IEPs is irrelevant. App. 11a. Renee Koupal petitions this Court for writ of certiorari.

INTRODUCTION

Congress stated that one of the purposes of the IDEA is to assure that students with disabilities have access to the public educational programs provided by the various states. But, further than simple access, Congress intended for that "access" to be meaningful. To accomplish the goal

of meaningfulness, Congress focused on the competencies of the personnel who would be working with these children. Congress has made it clear that if the school district personnel are not "competent" to meet the unique needs of an individual student with a disability, then they must become so. This is the heart of this action: Can Brett Koupal's educational needs be met without a requirement that the school personnel who work with him receive minimally adequate training in the methodology that is uncontested as the only method that will allow him to benefit from his individualized education program? All parties agree that he cannot. The substantive question this case raises is an extremely important issue that affects the hopes and aspirations of many children with disabilities throughout the country: Does the IDEA allow for teacher training language to be contained in an IEP when appropriate to meet the unique needs of a child with a disability? Petitioner requests that this Court exercise its discretionary jurisdiction and grant this petition for writ of certiorari for several reasons.

I. THE SOUTH DAKOTA SUPREME COURT ERRED AS A MATTER OF LAW IN HOLDING THAT TEACHER TRAINING CANNOT BE A "RELATED SERVICE" UNDER THE INDIVIDUALIZED EDUCATION PROGRAM OF BRETT KOUPAL. THIS DECISION CONFLICTS WITH THE DECISION OF THE UNITED STATES SUPREME COURT.

The South Dakota Supreme Court held that teacher training cannot be a related service under the IDEA and therefore cannot be included in the IEP. App. 10a. Petitioner contends that the exclusion of this language will

render the IEP meaningless and will result in a denial of a free appropriate public education for children with disabilities. Without minimally-trained personnel, the school district cannot satisfy the standard set out in the *Rowley* decision. *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). That standard requires that an IEP that is developed pursuant to the procedures of the IDEA be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 207. This Court also stated:

> According to the definitions contained in the Act, a 'free appropriate public education' consists of educational instruction specially designed to meet the **unique needs of the handicapped child**, supported by such services as are necessary to permit the child 'to benefit' from the instruction.

Id. at 188-89 (emphasis added).

> [I]f **personalized instruction** is being provided with **sufficient supportive services** to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a 'free appropriate public education' as defined by the Act.

Id. at 189 (emphasis added) (footnote omitted). Without adequately-trained personnel, the school district cannot implement Brett's IEP. If the school district cannot implement his IEP, it cannot confer educational benefits to Brett Koupal. If there is no benefit, there is no free appropriate public education.

This Court has ruled that services necessary to assure that a child with a disability receives a free appropriate

public education are "related services" under the IDEA, even when not specifically listed in the statute. As Petitioner has stated before, "Congress sought primarily to make public education available to handicapped children" and "to make such access meaningful." *Rowley*, 458 U.S. at 192. A service that enables a handicapped child to **remain at school during the day** is an important means of providing the child with the meaningful access to education that Congress envisioned. For example, Brett Koupal's IEP team deemed it so important that Brett have sufficiently trained staff working with him that his IEPs provided that if his trained personnel are not going to be at school on a given day, Brett is to remain at home. The IDEA makes specific provision for services, like transportation, that do no more than enable a child to be physically present in class, *see* 20 U.S.C. § 1401(a)(17). Services like CIC that permit a child to remain at school during the day are no less related to the effort to educate than are services that enable the child to reach, enter, or exit the school. *Irving Independent School District v. Tatro*, 468 U.S. 883, 891 (1984). This Court went further to state that "Congress plainly required schools to hire various specially trained personnel to help handicapped children, such as "trained occupational therapists, speech therapists, psychologists, social workers and **other appropriately trained personnel**." *Tatro*, 468 U.S. at 893 (emphasis added) (*quoting* S. Rep. No. 94-168, *supra*, at 33, U.S. Code Cong. & Admin. News 1975, p. 1457). The South Dakota Supreme Court misconstrued and misapplied this Court's rulings in *Rowley* and *Tatro*, creating a direct conflict between the South Dakota Supreme Court

and the United States Supreme Court. This Court has stated:

> Congress first addressed the problem of educating the handicapped in 1966 when it amended the Elementary and Secondary Education Act of 1965 to establish a grant program "for the purpose of assisting the States in the initiation, expansion, and improvement of programs and projects . . . for the education of handicapped children." Pub.L. 89-750, s 161, 80 Stat. 1204. That program was repealed in 1970 by the Education of the Handicapped Act, Pub.L. 91-230, 84 Stat. 175, Part B of which established a grant program similar in purpose to the repealed legislation. Neither the 1966 nor the 1970 legislation contained specific guidelines for state use of the grant money; both were aimed primarily at stimulating the States to develop educational resources and to **train personnel for educating the handicapped**.

Rowley, 458 U.S. at 179-180 (1982) (emphasis added) (*quoting* S. Rep. No. 94-168, p. 5 (1975) (S. Rep.); H. R. Rep., at 2-3, U.S. Code Cong. & Admin. News 1975, p. 1425). The only vehicle for providing a free appropriate public education to a student with a disability is the IEP. The IDEA mandates that the special education and related services be **tailored to the unique needs of the student with a disability** through an "individualized education program." This Court noted:

> The IEP is in brief a comprehensive statement to the educational needs of a handicapped child and the **specially designed instruction and related services** to be employed to meet those needs. Section 1401(19).

Burlington Sch. Comm. of the Town of Burlington v. Dept. of Educ., 471 U.S. 359, 368 (1985) (emphasis added). By disallowing teacher training from being included in any student's IEP, the South Dakota Supreme Court undermines the rulings of this Court and denies many children with disabilities a free appropriate public education.

II. THE SOUTH DAKOTA SUPREME COURT ERRED AS A MATTER OF LAW IN HOLDING THAT TEACHER TRAINING COULD NOT BE INCLUDED IN THE INDIVIDUALIZED EDUCATION PROGRAM OF BRETT KOUPAL. THIS DECISION CONFLICTS WITH DECISIONS FROM ALL OTHER JURISDICTIONS INCLUDING THE FEDERAL CIRCUIT COURTS OF APPEAL.

All parties agree that Brett needs a specific instructional methodology, the "TEACCH" methodology, before he can receive educational benefit from any educational program. The only dispute is over whether the additional teacher training that is necessary to implement this methodology is to be set out in the IEP. Without including the specific training needs of school personnel in the student's IEP, the student has no enforceable right to receive a free appropriate public education ("FAPE"). This is at odds with Congressional intent and the rulings of this Court, as well as of numerous lower Federal Courts, independent hearing officers and the Department of Education's Office for Civil Rights.

In a **Georgia** case, the court cited expert testimony to the effect that a student with *autism* must be educated by a teacher specially trained in working with children with *autism*, and that unless a teacher has a full grasp of the

child's autism needs, the possibility for progress would be jeopardized. The court thus concluded that such services were a "necessity rather than the optimum situation," and that therefore the district denied the student a FAPE and residential placement was necessary in order to receive a FAPE.[1]

An **Alabama** case similarly held such services were a "necessity rather than the optimum situation," and expressed its concern that teachers and staff who are involved in the student's education may lack expertise and training necessary to provide him with a minimally adequate program.[2] In another Alabama case, the court acknowledged that the student's teachers were not trained in techniques essential to an appropriate program, and ordered the board to provide suitable inservice training, suggesting that they could comply with the decree by assuring attendance at a certain nationally recognized program.[3] Decisions by the Department of Education's Office for Civil Rights (OCR) have held that school districts violate § 504 and the applicable regulations for failure to provide special education students with appropriately certified and properly qualified teachers and aides.[4]

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[1] *Drew v. Clarke County Sch. Dist.*, 676 F. Supp. 1559 (M.D. Ga. 1987) *aff'd* 877 F.2d 927 (11th Cir. 1989).

[2] *Chris D. v. Montgomery County Bd. of Education*, 753 F. Supp. 922 (M.D. Ala. 1990).

[3] *Campbell v. Talladega County Bd. of Education*, 518 F. Supp. 47 (N.D. Ala. 1981).

[4] *Pike County Sch. District*, 16 IDELR 807 (OCR Ala. 1990); *Conecuh County Sch. District*, 21 IDELR 805 (OCR Ala. 1994).

In a **Texas** case, a Hearing Officer ruled that the student required residential placement in order to receive FAPE because many of his teachers and aides did not have adequate training or experience in special education and therefore he was not receiving educational benefit.[5] In another Texas case, the federal district court held that an IEP which would have changed an *autistic* student's placement from residential to in-district was not reasonably calculated to provide a FAPE because there was evidence the child would have *regressed* if removed.[6] In another Texas case, the Hearing Officer approved of a proposed IEP which changed an *autistic* student's placement to a neighboring school district because the evidence showed that the staff in the neighboring district had experience in teaching children with autism and had sufficient training in autism.[7] In another Texas case, the Hearing Officer agreed with parents that the child would be able to receive a FAPE in regular education classes, provided she receive appropriate supplemental aides and services, and ordered that the child's IEP be modified and that the teachers and staff who work with the student be given inservice training to assist them in providing her with a special education program in the regular education classroom.[8]

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[5] *El Paso Independent Sch. District*, 21 IDELR 462 (SEA Tex. 1994).

[6] *Garland Independent Sch. Dist v. Wilks*, EHLR 558:308 (N.D. Tex. 1987).

[7] *Case No. 017-SE-1083*, EHLR 506:240 (SEA Tex. 1984).

[8] *City View Independent Sch. Dist.*, 20 IDELR 854 (SEA Tex. 1993).

In an **Ohio** case, the court found no denial of FAPE when there was sufficient evidence that the district had numerous activities intended to improve the personnel's knowledge and skills regarding programs for *autistic* children, and that the district had provided adequate inservice training to the faculty and staff.[9] In another Ohio case, the court held that teachers must be able to fully instruct the student, and if a teacher does not have the sufficient level of skills, then he or she cannot appropriately implement the IEP.[10]

In a **Rhode Island** case, an agreement was reached between complaining parents and the district which committed the district to inservice training for students' teachers.[11] Similarly, in a **New Jersey** case, the parent of a child with *autism* made a request of the district, which was granted at mediation, that the teaching staff receive training in facilitated communication.[12] In another New Jersey case, the district court reversed the decision of an Administrative Law Judge that an aide was not required because it was not agreed upon originally, and remanded the matter for a determination of the necessity of an aide, impliedly holding that if it is determined that an aide is

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[9] *Rettig v. Kent City Sch. Dist.*, 539 F. Supp. 768 (N.D. Ohio 1981) *aff'd* 720 F.2d 463 (6th Cir. 1984).

[10] *Mentor Exempted Village Sch. Dist.*, 3 EHLR 502:294 (Ohio 1981).

[11] *Foster-Glocester Regional Sch. District*, 21 IDELR 1002 (R.I. 1994).

[12] *E.M. v. Millville Bd. of Education*, 21 IDELR 118 (SEA N.J. 1994).

necessary, then the district must provide one even if such services were not in the original IEP.[13]

In a **Wisconsin** case, an Independent Review Officer determined that in order to insure provision of FAPE to students with *autism*, the district was obligated to develop policies to make sure that there is a professional on staff with knowledge of autism, and ordered the district to redraft the IEP to provide as such.[14] In another Wisconsin case, an Independent Review Officer concluded that the district's attempt to remedy an inappropriate IEP by including a provision for consultation with an autism expert would have been sufficient to provide a FAPE had the parents not rejected the modification.[15]

In an **Iowa** case, an Administrative Law Judge agreed with the parents of an autistic child that he should remain in the neighborhood school, but found a number of deficiencies in the current program, and ordered the district to ascertain the inservice training needs of those having the primary instructional responsibility for his education.[16]

In a **Florida** case, a Hearing Officer determined that the district's policy of not including special speech and

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[13] *D.R. v. East Brunswick Board of Education*, 20 IDELR 957 (D.N.J. 1993).

[14] *Fond du Lac Sch. District*, 20 IDELR 203 (SEA Wis. 1993).

[15] *Wilmot Union High Sch. Dist.*, 20 IDELR 1368 (SEA Wis. 1994).

[16] *North Scott Community Sch. District*, 21 IDELR 226 (SEA Iowa 1994).

language services in an IEP and allowing a speech therapist to make the determination interfered with the student's right to receive an individualized education to meet his unique needs and denied him a FAPE because the district offered the services and then removed them from the IEP causing the student to *regress*. The district was ordered to compose a new IEP including the services.[17]

In a **Michigan** case, the Hearing Officer concluded that a new replacement aide could continue, provided that she receive on-the-job training specifically designed in specialized equipment and the child's unique needs, and that the training be more comprehensive than normally required in light of the child's complex needs and condition.[18]

In a **Pennsylvania** case, a review panel affirmed the determination of the Hearing Officer that certain services which the district sought to eliminate from the IEP were inextricably intertwined with other elements of the IEP, and therefore ordered the district to provide the services.[19] In another Pennsylvania case, the court held that certain agreed upon provisions in an IEP must remain in the IEP since removing them would cause the child to

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[17] *Hillsborough County Sch. Board*, 21 IDELR 191 (SEA Fla. 1994).

[18] *Ludington Area Sch. District*, 20 IDELR 211 (SEA Mich. 1993).

[19] *School District of Philadelphia*, 20 IDELR 797 (SEA Pa. 1993).

regress significantly and thereby render the IEP ineffective.[20]

These cases are consistent with the testimony concerning Brett Koupal. Not only does he need to have his IEP implemented using the TEACCH methodology, but the school personnel must be familiar with and have a certain level of training in that methodology or they will not be able to confer educational benefit to Brett.

All of these cases have one thing in common: They all focus on the individual educational needs of the child and then discuss the impact that the child's needs have on the school personnel and their ability to meet those needs. All parties agree that Brett needs to have specially designed instruction, specifically the TEACCH methodology. All parties agree that school personnel must be specially trained in the TEACCH methodology before they can implement Brett's IEP goals and objectives. All of Brett's former teachers agree that the minimum amount of training necessary to implement the TEACCH methodology is the five-day course such as offered in South Dakota and other states. Brett's current IEP states: "Due to the complex nature of Autism, and the extensive expertise that is needed to appropriately teach these children, it is of critical importance that those who are working with Brett receive sufficient autism-specific training." However, the School District removes the language defining the previously agreed-upon training competency required: "Therefore, Brett's classroom teacher will have

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[20] *Delaware County Intermediate Unit #25 v. Martin & Melinda K.*, 20 IDELR 363 (E.D. Pa. 1993).

received, at the very least, the five-day TEACCH training course prior to working with him." The South Dakota Supreme Court's ruling effectively removes the assurance that a student's IEP will contain the entire program necessary to confer a free appropriate public education. The IDEA, the rulings of this Court, and the legislative history all make clear that the IEP is the vehicle for assuring that this specially designed instruction is provided so that students with disabilities can benefit from the educational offering of the school district. The South Dakota Supreme Court's ruling departs from accepted practice and creates an intolerable conflict with judicial and administrative decisions throughout the country.

III. THE IMPORTANCE OF THE ISSUES INVOLVED IN THIS CASE WARRANT THE EXERCISE OF THIS COURT'S DISCRETIONARY JURISDICTION. ALLOWING THE SOUTH DAKOTA SUPREME COURT'S DECISION TO EXCLUDE TEACHER TRAINING FROM STUDENTS' INDIVIDUALIZED EDUCATION PROGRAMS WILL UNDERMINE THEIR RIGHTS TO RECEIVE A FREE APPROPRIATE PUBLIC EDUCATION.

The impact of the South Dakota Supreme Court's decision on students with disabilities will be profound. In enacting the IDEA, Congress created a "basic floor of opportunity" for students with disabilities. In discussing this requirement, this Court stated that:

> Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped

> child. It would do little good for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education. The statutory definition of "free appropriate public education," in addition to requiring that States provide each child with **"specially designed instruction,"** expressly requires the provision of "such . . . supportive services . . . as may be required to assist a handicapped child to benefit from special education." Section 1401(17) (emphasis added). We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to **specialized instruction and related services** which are individually designed to provide educational benefit to the handicapped child.

Rowley, 458 U.S. at 200-201 (emphasis added, footnote omitted). By disallowing teacher training language in an IEP, when necessary to confer educational benefit, the IDEA and any IEP developed pursuant to its procedures will be rendered meaningless. Students with disabilities have a right to benefit from their educational programs. If the school personnel do not have, and are not required to obtain, training adequately tailored to meet the unique needs of students with disabilities, the IDEA will have no impact. This result is due to the potential of having an otherwise appropriate IEP, developed under the procedural requirements of the IDEA, but having no school personnel who can competently implement the goals and objectives in the student's IEP based on the child's unique needs. Each student with a disability has a right to a free appropriate public education. If the school personnel do

not have the requisite skills to implement a student's IEP, the school district *cannot* confer any educational benefit to the student. This is an extremely important issue because of the far-reaching consequences of the South Dakota Supreme Court's ruling.

IV. THE IMPORTANCE OF THE FEDERAL QUESTION INVOLVED IN THIS CASE WARRANTS THE EXERCISE OF THIS COURT'S DISCRETIONARY JURISDICTION. THE NARROW INTERPRETATION THE SUPREME COURT OF SOUTH DAKOTA GIVES TO THE IDEA AND THE APPLICABLE FEDERAL REGULATIONS UNDERMINES THE FUNDAMENTAL PURPOSE OF THE ACT AND IS AT ODDS WITH A WELL-ESTABLISHED CONSTRUCTION GIVEN THE STATUTE BY THE ADMINISTRATIVE AGENCY CHARGED WITH ITS ENFORCEMENT AND COMMON PRACTICE OF SCHOOL DISTRICTS NATIONWIDE.

The decision of the South Dakota Supreme Court impedes the effectiveness and purpose of the IDEA. The conflict between the South Dakota Supreme Court and all other courts that have applied the IDEA is of utmost importance because the highest court of South Dakota has given the IDEA and the federal regulations such a narrow interpretation as to undermine the fundamental purpose of the Act. The South Dakota Supreme Court's decision not only frustrates the intent of Congress in enacting the IDEA, but, more importantly, is so inconsistent with all decisions from other jurisdictions that the intent and meaning of the statute will be rendered meaningless without a resolution of the conflict from the U.S. Supreme Court.

Congressional intent of the IDEA is clearly reflected in the legislative history: "Handicapped children are denied access to public schools because of a lack of trained personnel." 121 Cong. Rec. H23708 (remarks by Rep. Mink). The plain language of the statute states that the purpose of the IDEA is "to assure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs [and] to assure that the rights of children with disabilities and their parents or guardians are protected. . . . " 20 U.S.C. § 1400(c). The decision of the South Dakota Supreme Court has the effect of denying students a free appropriate public education by precluding language in the IEP that assures that they have a teacher minimally competent to teach them.

Currently, the IEP is the only vehicle to assure access to teachers with a minimum, measurable level of autism-specific teacher training because it is what "sets forth in writing a commitment of resources necessary to enable a child with a disability to receive needed special education and related services." 34 C.F.R. Part 300, Appendix C. Not only are an immense amount of children affected by the decision, but the decision and the conflict it creates impacts the enforceability of potentially hundreds of administrative orders nationwide which include the provision of services to which the South Dakota Supreme Court disapproved.

Furthermore, the decision of the South Dakota Supreme Court is at war with a well-established construction given the statute by the administrative agency charged with its enforcement and the common practice of

school districts nationwide. The Federal Office of Special Education Programs (OSEP) addressed whether federal regulations should make specific dictates regarding class size, class composition and **staffing needs** for children who are deaf. OSEP stated: "The IEP requirements in 34 C.F.R. 300.340-300.349 afford school districts the flexibility to address a broad array of needs in the IEP of each child who requires particular instruction or services in order to receive an appropriate education." *Policy Letter*, 16 EHLR 797, 799 (OSEP 1990). The federal government has thus interpreted the IDEA to allow IEPs the flexibility to contain requirements for teacher training based on a child's unique needs.

The U.S. Department of Education has noted that minimum training of the teacher, when required to implement the IEP, can be contained in an IEP. In discussing the purpose of the IEP, the Department of Education stated:

> There are two main parts of the IEP requirement, as described in the Act and regulations:
>
> (1) The IEP meeting(s), where parents and school personnel jointly make decisions about an educational program for a child with a disability, and
>
> (2) The IEP document itself, that is, a written record of the decisions reached at the meeting. The overall IEP requirement, comprised of these two parts has a number of purposes and functions:
>
> a. The IEP meeting serves as a communication vehicle between parents and school personnel, and enables them, as equal participants, to jointly decide what the child's needs are, **what services will be provided to meet those**

> **needs**, and what the anticipated outcomes may be. . . .
>
> c. The IEP sets forth in writing **a commitment of resources** necessary to enable a child with a disability to receive needed special education and related services.
>
> d. The IEP is **a management tool** that is used to ensure that each child with a disability is provided special education and related services appropriate to the child's special learning needs.

34 CFR Part 300, Appendix C (emphasis added). Inclusion of teaching competencies is clearly contemplated by this language. Excluding teacher training from the IEP process defeats each of these purposes of the IDEA.

To further the goal of assuring that students with disabilities are served by appropriately trained personnel, states must include within their state plans a "comprehensive system of personnel development." 34 C.F.R. § 300.139. Local education agencies likewise must include within their comprehensive plans for application for funds "procedures for the implementation and use of the comprehensive system of personnel development established by SEA under § 300.139." 34 C.F.R. § 300.224. The "comprehensive system of personnel development" requires not only that professionals have proper certification or licensure (34 C.F.R. § 300.381), but also that:

> Each State plan must include a description of the procedures and activities the State will undertake **to ensure that all personnel necessary to carry out this part are appropriately and adequately prepared**. The procedures and activities must include –

> (a) **A system for the continuing education of regular and special education and related services personnel to enable these personnel to meet the needs of children with disabilities under this part.** . . .

34 C.F.R. § 300.382 (emphasis added). School districts in each state must be able to assure that teachers or other professionals gain **additional competencies** when working with children with disabilities. *See* 20 U.S.C. § 1413(a)(3)(B). These additional skills can only be gained by continuing education and training and must be based on the individual child's unique educational needs. The South Dakota Circuit Court correctly ruled that teacher competency can be a part of Brett's IEP. App. 15a, 19a. The South Dakota Supreme Court clearly erred, contrary to federal law, in ruling that teacher training cannot be included in a child's IEP.

The South Dakota Supreme Court's ruling that teacher training language cannot be contained in an IEP is also in direct conflict with the statutory language of the IDEA. When Congress last reauthorized the Act, it added the definitions of "assistive technology device" and "assistive technology service" at 20 U.S.C. §§ 1401(a)(25) and 1401(a)(26) respectively. The implementing regulations state:

> Each public agency shall ensure that assistive technology devices or assistive technology services, or both, as those terms are defined in Secs. 300.5-300.6, are made available to a child with a disability if required as part of the child's –
>
> (a) Special education under Sec. 300.17;
>
> (b) Related services under Sec. 300.16; or

(c) Supplementary aids and services under Sec. 300.550(b)(2).

34 C.F.R. § 300.308. The South Dakota Supreme Court's ruling becomes troublesome when examining the definition of "assistive technology service", which includes, in part: "training or technical assistance for professionals (including individuals providing educational and rehabilitation services). . . . " 20 U.S.C. § 1401(a)(26)(F). The Act clearly states that teacher training can be included in a child's IEP as "special education" or "related services," here dealing specifically with the area of assistive technology services. The South Dakota Supreme Court's ruling makes no exceptions. It directly conflicts with the statutory provisions of the IDEA.

The applicable regulations clearly state that "each state plan must include a description of the procedures and activities the state will undertake to ensure that all personnel necessary to carry out this part are appropriately and adequately prepared." 34 C.F.R. § 300.382. Additionally, the "training of teachers and other personnel" is expressly included among the list of costs allowed under state programs for children with disabilities. 34 C.F.R. § 302.51(a)(4).

Thus the school district must be able to show that they have taken all reasonable steps to acquire additional training for their teaching staff so that each child has a reasonable expectation of benefiting from their educational programs. Continuing education of all school personnel who are responsible for implementing the IEP is required. Allowing a school district to exclude teacher

training from the IEP undermines the strong Congressional intent that school personnel continually strive to acquire the most promising education practices for educating students with disabilities.

The decision of the South Dakota Supreme Court causes a serious hinderance to the effective administration of the IDEA by adversely affecting the government's ability to enforce compliance with the Act, and provide services required by it to children with disabilities. Even more clear is that "[t]he quality of the educational services provided to handicapped students must equal that of the services provided to nonhandicapped students; thus, handicapped student's teachers must be trained in the instruction of persons with the handicap in question and appropriate materials and equipment must be available." 34 C.F.R. Part 104, Appendix A, #23. In light of such language, the South Dakota Supreme Court decision renders troublesome a federal issue involved in numerous cases pending in lower courts, thereby making essential an early and definitive ruling by the United States Supreme Court.

CONCLUSION

For the foregoing reasons, Petitioners urge this Court to exercise its discretionary jurisdiction and grant this petition for writ of certiorari.

Respectfully submitted,

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SIOUX FALLS SCHOOL DISTRICT,

Plaintiff and Appellee

v.

Renee **KOUPAL,**

Defendant and Appellant

No. 18670-a-JKK

South Dakota Supreme Court

On Appeal from the Circuit Court of the Sixth Judicial Circuit Hughes County, South Dakota. Prior due process ruling reported at 19 IDELR 796.

December 21, 1994

Summary

A six-year-old student with severe autism received instruction from the district through the TEACCH method, and two of his former IEPs included an attachment submitted by his parent which mandated that the student's teacher complete a five-day TEACCH training course. When the district removed the training requirement from the student's current IEP, the parent sought due process. A hearing officer ruled that teacher training could be included in an IEP, and that the removal of the training requirement was inappropriate. The district appealed, and a state trial court reversed that decision. Then, the parent appealed.

HELD: for the district.

The state supreme court pointed out that neither the definition of related services in the Part B regulations nor

the corresponding state regulations specifically enumerated teacher training as a related service. While the court noted that these definitions were not all inclusive, it agreed with the trial court that teacher training was not a related service. Consequently, teacher training could not be required in an IEP. Nor did the trial court err in deeming the contents of the student's former IEPs irrelevant to a determination as to what services should be included in his present IEP, finding no requirement in the IDEA which held school authorities or parents to the terms of an IEP indefinitely. Such a notion was contrary to the Part B provision calling for annual reviews of IEPs, and revisions of IEPs when appropriate. Thus, the decision of the trial court was affirmed.

Counsel for Parent: John A. Hamilton, South Dakota Advocacy Services, Pierre, South Dakota, Mark Partin, Advocacy, Inc., Austin, Texas.

Counsel for District: Michael L. Luce, Davenport, Evans, Hurwitz & Smith, Sioux Falls, South Dakota.

KONENKAMP, Justice

An autistic child's mother appeals the circuit court's judgment rejecting her challenge of a school district's refusal to include specific teacher training in her child's education plan. We affirm.

Six-year-old Brett Koupal suffers from severe autism. He receives special education from the Sioux Falls School District (School District), which includes instruction through the TEACCH method, a program developed at the University of North Carolina specifically designed for

autistic children. TEACCH stands for "Treatment and Education of Autistic and related Communication, handicapped CHildren." When Brett's IEP (Individualized Education Program) was prepared in both 1991 and 1992, Brett's mother, Renee Koupal, attached to the IEPs several typed pages designated as "Other Related Services" which included the following statement:

> Due to the complex nature of Autism, and the extensive expertise that is needed to appropriately teach these children, it is of critical importance that those who are working with Brett receive sufficient autism-specific training. Therefore, Brett's classroom teacher will have received, at the very least, the five-day TEACCH training course prior to working with him.

The School District took no issue with these additions.

Dr. Tom Stanage, director of the autism program at the University of South Dakota, conducts South Dakota's only five-day TEACCH course. Attendance is limited to twenty-five people and the course is held only twice a year: once in Rapid City and once in Sioux Falls, both sessions in June. Dr. Stanage believes a teacher could become sufficiently trained to use the TEACCH system by means other than the five-day workshop, though such alternatives are less preferred.

Both the School District and the mother agree that Brett's teachers have always been competent in the TEACCH method. The mother's concerns were aroused, however, when in May of 1992 she learned that Brett's summer teacher had not taken the five-day TEACCH course. The mother considered the course mandatory for Brett's teachers, in accord with her attachment to the IEP.

She complained to Karen Roth, the School District's Director of Exceptional Children's Services. Although Roth later classified the mother's attached pages as non-binding "suggestions" which the District would attempt to follow, the School District responded by arranging for the teacher, Sandy Ragels, to attend the course. She could only attend the class four of the five days, due to conflicts in her schedule. To make up for the missed training day, the School District paid two special education teachers, trained and experienced in the TEACCH method, to work with Ragels for ten hours.

When School District officials met with Brett's mother on December 11, 1992 to review his IEP, the School District announced its intent to exclude from Brett's IEP language specifically requiring the five-day TEACCH course for his teachers. The School District assured the mother that Brett will continue TEACCH method instruction, but the mother feared that teachers trained with anything less than the full five-day TEACCH course would cause Brett to regress. The mother initiated a due process hearing pursuant to 20 U.S.C. § 1415(b)(1)(E).

A hearing examiner heard evidence on March 26, 1993 and entered findings of fact and conclusions of law, deciding that teacher training could be included in an IEP and that it was inappropriate for the School District to remove the five-day course requirement from Brett's current IEP. The School District appealed, and, on independent review, the circuit court reversed. The mother raises the following issues on appeal:

I. Did the circuit court err in holding that specific teacher training could not be mandated in Brett's IEP?

II. Did the trial court err in finding immaterial the teacher training language in Brett's two previous IEPs?

III. Is the mother entitled to attorney's fees?

Analysis

The Individuals with Disabilities Education Act (IDEA), formerly known as the Education of the Handicapped Act, 20 U.S.C. § 1400 *et seq.*, provides federal funding to assist state and local agencies in educating disabled children. Brett clearly qualifies under the Act: Autistic disorder is a lifelong neurologically-based developmental disability characterized by communication dysfunction and other profound impairments. IDEA requires "that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their parents or guardians are protected. . . . " 20 U.S.C. § 1400(c). The United States Supreme Court defined "free appropriate public education" in *Hendrick Hudson, Dist. Bd. of Ed. v. Rowley,* 458 U.S. 176, 200-01, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982):

> Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped

> child. . . . We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

A disabled child's unique education needs must be tailored by means of an IEP, 20 U.S.C. § 1401(c). An IEP is a written statement for each disabled child which details the child's present educational performance level, the annual goals and short term objectives, specific educational services to be provided, duration of services, and the criteria for measuring and evaluating the objectives. 20 U.S.C. § 1401(20). An IEP is developed by a school representative qualified in special education, the child's teacher, the parents or guardian, and, if appropriate, the child. 20 U.S.C. § 1400(c), 1401(19), 1412(7), 1415(b)(1)(A), (C), (E), and 1415(b)(2); 34 C.F.R. § 300.345.

To present complaints about an IEP, IDEA gives a disabled child's parents the right to initiate an "impartial due process hearing" before a hearing examiner and further gives either side the right to appeal the hearing examiner's decision to state or federal court. 20 U.S.C. §§ 1415(b)(1)(E), 1415(e)(2). *Rowley* imposes a two-part test to evaluate challenges to an IEP: (1) Has the school administration complied with IDEA's procedures; and (2) is the IEP reasonably calculated to enable the child to receive educational benefits? 458 U.S. at 206-07, 102 S.Ct. at 3051. Cognizant of IDEA's moderate goal to provide appropriate, not optimal, special education (*Rowley*, 458 U.S. at 198, 102 S.Ct. at 3046-47), courts may not substitute their "notions of sound educational policy for those

of the school authorities." 458 U.S. at 206, 102 S.Ct. at 3051. In reviewing a hearing examiner's decision, the trial court must, while according the hearing examiner's decision "due weight," independently decide based on a preponderance of the evidence, whether the school administration has satisfied IDEA's requirements. 20 U.S.C. § 1415(e)(2); *Rowley*, 458 U.S. at 206, 102 S.Ct. at 3051; *Petersen v. Hastings Public Schools*, 31 F.3d 705 (8th Cir. 1994); *Lachman v. Illinois State Bd. Educ.*, 852 F.2d 290, 293 (7th Cir. 1988), *cert. denied*, 488 U.S. 925, 109 S.Ct. 308, 102 L.Ed.2d 327 (1988). The standard of review at the trial court level "required a more critical appraisal of the agency determination than clear-error review entails, but which, nevertheless, falls well short of complete *de novo* review." *Lenn v. Portland School Committee*, 998 F.2d 1083, 1086 (1st Cir. 1993). In an IDEA appeal, a trial court may, under certain circumstances, hear additional evidence. 20 U.S.C. § 1415(e)(2). So the independent review is "one of involved oversight" subject to the judge's "exercise of informed discretion." *Lenn*, 998 F.2d at 1087; *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983 (1st Cir. 1990), *cert. denied*, 499 U.S. 912, 111 S.Ct. 1122, 113 L.Ed.2d 230 (1991).

The trial court determined that the School District complied with IDEA and that the proposed IEP was reasonably calculated to enable Brett to receive educational benefits. At the appellate level our review is limited to the clearly erroneous standard for the trial court's factual findings. *Wolff v. Royal Ins. Co. of America*, 472 N.W.2d 233 (S.D. 1991); *In re Estate of Hobelsberger*, 181 N.W.2d 455, 459 (S.D. 1970). The court's legal conclusions are fully reviewable. *Kayser v. State Elec. Comm'n*, 512

N.W.2d 746, 747 (S.D. 1984); *Reid v. Huron Bd. of Educ.*, 449 N.W.2d 240, 242 (S.D. 1989). The decision will stand unless we are definitely and firmly convinced a mistake has been made. *Selle v. Pierce*, 494 N.W.2d 634, 636 (S.D. 1993); *Permann v. Dept. of Labor*, 411 N.W.2d 113 (S.D. 1987).

I: Did the Circuit Court Err in Holding that Specific Teacher Training Could not be Mandated in Brett's IEP?

Both the mother and the School District agree that TEACCH is an appropriate and necessary method for teachers working with Brett. The School District favors an IEP requiring that the TEACCH method be used, but it opposes language in the IEP mandating that instructors specifically receive the five-day course. The mother reasons that unless Brett's IEP contains specific language requiring his teachers to take the five-day TEACCH training course, there is no other way to objectively measure teacher competency in the TEACCH method.

When the mother added her "Other Related Services" document to Brett's IEP, she sought to invoke federal law requiring support services for disabled children. IDEA's provision of a "free appropriate public education" is satisfied when the instruction is given "with sufficient support services to permit the child to benefit educationally." *Rowley*, 458 U.S. at 203, 102 S.Ct. at 3049. Indeed, an IEP must include all services necessary to meet the child's identified special education and related service needs. 34 C.F.R. § 300 *et seq.* These services are defined as:

> transportation and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabiliation counseling, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as are required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

20 U.S.C. § 1401(17); *see also* 34 C.F.R. § 300.16(a). This list is "not exhaustive and may include other developmental, corrective, or supportive services. . . ." 34 C.F.R. § 300.16, note. South Dakota's implementing regulations further define "related services" in ARSD 24:05:13:01(16):

> services that support the provision of special education, including transportation and those developmental, corrective, and other supportive services determined by a local placement committee to be required for an eligible child to benefit from special education.

The trial court found that these definitions do not include teacher training as a service. We concur. Under the time honored canon of *ejusdem generis,* where general words in a statute accompany the enumeration of particular classes of things, the general words will be construed as applying only to things of the same general kind as those enumerated. *Grievance of O'Neill,* 347 N.W.2d 887 (S.D. 1984); *Kelley v. Duling Enterprises, Inc.,* 172 N.W.2d 727 (S.D. 1969); *State v. Fairbanks,* 273 N.W. 188, 111 A.L.R. 759 (S.D. 1937); *See also Aberdeen Ed. Ass'n v. Aberdeen Bd.*

of Ed., 215 N.W.2d 837, 843 (S.D. 1974) (Wollman, J., concurring specially). Although these definitions may not be all inclusive, the scope of the listed services clearly fails to encompass specific teacher training.

Inasmuch as teacher training is not a related service under federal law, it cannot be required in an IEP. Brett's mother certainly maintains a genuine concern: Inadequately trained teachers may deprive her disabled son of a chance for maximum progress. We must nonetheless observe that although providing capable teaches may be implicit in IDEA, Congress left teacher competency in the control of school administrators. *Cf. Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290, 297 (7th Cir. 1988). A parent, no matter how well-intentioned, cannot dictate to a school district, as part of her disabled child's IEP, how teachers will be trained or how their competency will be measured.

II: Did the Trial Court Err in Finding Immaterial the Teacher Training Language in Brett's Two Previous IEPs?

The School District officials believed the mother's attachments were not part of the IEP. The hearing examiner recognized some confusion on whether the mother's attached pages constituted part of Brett's IEP. He held, nevertheless, that the School District was estopped from arguing that the mandatory teacher training language was not part of Brett's official IEP, because it was attached to his 1991 and 1992 IEPs and the School District never objected to the language, nor did it inform the mother that it did not consider the attachments part of

the formal IEP. So the question here is, can a school district be required to provide items in an IEP, because it acceded to them in the past, even though the law does not require them to be provided? The trial court deemed the contents of the prior IEPs irrelevant to determining what should be included in his present IEP. We agree. We can find no requirement in IDEA which binds school authorities or parents indefinitely to the terms of an IEP. On the contrary, each disabled child's IEP must be reviewed periodically, not less than annually, and, if appropriate, revised. 34 C.F.R. § 300.343(d); ARSD 24:05:27:08. If parents and school administrators cannot agree on what is appropriate, a due process hearing is available. At the hearing the critical issue is whether the proposed IEP is "appropriate for a particular child at a given point in time." *Burlington v. Department of Educ.*, 736 F.2d 773, 778 (1st Cir. 1984), *aff'd*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985). The circuit court held that the proposed IEP requiring TEACCH methodology for Brett, but not mandating specific teacher training, complied with IDEA in that it was reasonably calculated to enable Brett to receive educational benefits. This is all IDEA requires and we can require no more. *Rowley*, 458 U.S. at 206-07, 102 S.Ct. at 3051.

III: Is The Mother Entitled to Attorney's Fees?

IDEA provides:

> In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorney's fees as part of the

> costs to the parents or guardian or a handicapped child or youth who is the prevailing party.

20 U.S.C. § 1415(e)(4)(B). The mother has not prevailed in this appeal, so she is not entitled to attorney's fees.

Affirmed.

MILLER, Chief Justice, SABERS and AMUNDSON, Justices, and CALDWELL, Circuit Judge, concur.

STATE OF SOUTH DAKOTA	)	IN CIRCUIT
	) SS	COURT SIXTH
COUNTY OF HUGHES	)	JUDICIAL CIRCUIT

SIOUX FALLS SCHOOL DISTRICT,	*	CIV. NO. 93-150
Plaintiff,	*	TRANSCRIPT OF JUDGE ZINTER'S ORAL DECISION
-vs-	*	
RENEE KOUPAL,	*	
Defendant.	*	

BEFORE:

THE HONORABLE STEVEN L. ZINTER,
Circuit Court Judge of the Sixth
Judicial Circuit, Pierre, South
Dakota, on November 15, 1993.

* * *

APPEARANCES:

MICHAEL L. LUCE, ESQ.
Davenport, Evans, Hurwitz & Smith
Post Office Box 1030
Sioux Falls, South Dakota 57101-1030;

Counsel for the Plaintiff.

JOHN A. HAMILTON, ESQ.
South Dakota Advocacy Services
221 South Central
Pierre, South Dakota 57501;

Counsel for the Defendant.

[p. 2] THE COURT: Well, first of all – okay. I'm going to give you an oral decision here. The – so I apologize if this is going to look disjointed if it's typed up.

But first of all, the issue is whether the language "Therefore, Brett's classroom teacher will have received, at the very least, the five day TEACCH training Course –" and let me digress and point out the word course is capitalized, "– prior to working with him."

Well, it's obvious that what is at issue here is whether a specific course of the TEACCH methodology can be required in the IEP. As the Court views this, it's a question of law – or perhaps a mixed question of law and fact.

But in any event, the Court is mindful of the standard of review under the *Rowley* case and I've reviewed it accordingly. As far as the issues of law, I think it's important to start off to note what the Supreme Court said in the *Rowley* case itself where they indicated that the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside. And I think that language is appropriate here on the law – question of whether or not as a matter of law this kind of specific course content requirement can be put in an IEP.

[p. 3] In that regard, I disagree with the hearing examiner that it's a related service. The hearing examiner concluded that it should be – that it can be included because it's a related service. However, I think when you read the regular – the federal regulations – and I don't have the cites right here, but the C.F.R. that defines

related services, when you look at those in context – and I acknowledge, Mr. Hamilton, that it says the list is not all inclusive, but yet every one of the items listed is an identifiable service rather than teacher training.

And I think it's important to note that when training is referred to in the regulations, it talks about parents. It doesn't talk about teachers. So I think as a matter of law that it's not a related service. But I do agree with Brett Koupal that it probably – or he has [sic] hasn't argued it, but I believe that it is probably more – I shouldn't say that it is, but that the level of special education is something that can go under an IEP. And I believe that that's not a related service. It's the direct service.

So the question becomes in my mind whether or not this is includable as an item of special education service. And again, here we get into, I think what Mr. Hamilton has pointed out, it is fact sensitive. And that's why I say I think this is somewhat a mixed question of fact and law.

[p. 4] And in that regard though, I think when you read this record in its entirety, you have to come to the conclusion that although specific competency in the TEACCH methodology is certainly something which could be in an IEP, I don't believe that the record here as a matter of fact or law requires or mandates that a particular five-day course be included. And I say that for several reasons.

First of all, I'm going to refer to some of the testimony. And I think when you look at the testimony of Carla Miller, one of his prior teachers, she was specifically asked about this factual matter of whether or not you really have to have the specific TEACCH training.

And she was asked on page 166 whether or not it would affect Brett if the teacher did not have TEACCH training. She said it was detrimental – it would be detrimental. But she goes on to point out that it doesn't make any difference whether the TEACCH approach was absent because it was taught by a teacher who had training in TEACCH or whether it was a teacher who worked with autistic kids.

I think it's clear from that page that she didn't distinguish between TEACCH training by the five-day course or whether the experience was gained otherwise. And I think there's even more compelling testimony than that.

Specifically, when on page 196, there the teacher was [p. 5] asked – or excuse me, that may have been – was that Stanage or was that a teacher?

MR. HAMILTON: Page 196 is Tom Stanage.

THE COURT: And Mr. Stanage, I read his – I think his testimony is the most enlightening on this. He says – and I think this comes right down to the crux of the issue. Mr. Hamilton was trying to establish I think what you're arguing here today that a specific level of training is necessary. And Mr. Stanage would not agree to that.

In fact, he responded by saying competency is what is at issue, not training. Specifically, on lines 11 through 15, he's asked the question, "And now you have a great deal of training. Do you have any type of opinion as far as what might be a minimum amount of training to have enough background to work with children with autism?"

And after an objection, he does not respond by indicating what kind of training is necessary. Instead he responds in terms of competency. He answers on line 25. "I would respond to that, John, in terms of talking about some kind of minimum level of competencies, and I think one needs to have competence in terms of understanding or having knowledge about what is the nature of autism" et cetera, et cetera, et cetera.

Then he goes on, "I think also one needs to have [p. 6] competencies in terms of informal assessment, date of collection –" I assume that means – I assume date is a mistake, but he goes on to say, "I think one needs to have competencies in terms of programming to help children communicate, augmentative communication, competencies in behavior management, competencies in teaching social leisure skills and self-help skills. So I don't know if that answers your question, but I guess I would address it in terms of competencies."

I think that's precisely the issue here. I think it's also important to note that Dr. Stanage when pushed on this on pages 201 through 203 really indicates that the five-day course is not the only method. On page 201, he acknowledges that. He's asked the question, "And you are aware from your experiences, I assume, that there have been occasions when teachers have had to be hired after your June workshop and that one of the teacher's responsibilities may involve an autistic child or a child that utilizes the TEACCH system? Those occasions do arise, do they not?"

Answer, "I believe so. I don't –"

Then a question, "And would you agree that a teacher may be competent to utilize the TEACCH system without attending the five-day TEACCH training course?"

Answer, "Maybe, yes."

[p. 7] He goes on on [sic] the next couple of pages talking about two teachers who apparently didn't have the five-day course and he went on to work with them. And he was then asked on page 203 about the two individuals and the question was then rephrased to him on line 14 as follows. The question is, "Let me ask it this way, would you disagree that depending on what contingencies or emergencies that develop, that a teacher may be able to become sufficiently trained to utilize the TEACCH system by some direct involvement with you or by other means besides the five-day workshop?"

Answer, "I would agree with that, but just add that it's probably not preferable, from my point of view, because there is only one of me."

Well, I think that the – when you read this record in a common sense fashion, that it only makes sense and the record bears it out that someone could become competent by a method other than the specific five-day TEACCH course which is in this – which is allegedly I guess in the IEP.

I think it's also important to note that the five-day course that's involved here is, as I read the record, is offered once a year at two locations in South Dakota and is only limited – or is limited to 25 students per location.

[p. 8] The record also reflects that other TEACCH training courses are available throughout the country and I think it's fair from the record to infer, if not directly find evidence, that you could become competent in the TEACCH methodology other than through this five-day course.

So what I'm leading up to here is that although I do agree that an IEP may contain language which would require competence in the TEACCH methodology for this child, I don't believe the District can be forced to include in an IEP that Brett's teacher will have a particular course, that being the five-day TEACCH course that is referred to here.

Now, there's one other side issue. And before I go to that, I would just like to note for the record that even the – even Brett Koupal's own cases I think point that out. In their brief they talk about the *Mentor Exempted Village School* case, and I think a fair reading of that case really says that an appropriate education requires that a teacher be capable of using sign language. The IEP did not specify a training course. The independent hearing officer's order did not fail by not specifying a method.

Here though, the IEP requires a specific course and I don't think that that's – that that is well founded as a matter of law or as a matter of fact and law under Brett's [p. 9] particular case.

Now, the last issue I think is this issue of the – whether it was in the prior IEP's. And based a lot upon the oral argument that we've had here today and also on the record and on the brief of Brett Koupal, I don't think it's material or relevant. I think at least two places in Mr.

Koupal's brief it was conceded that it's not relevant because the IEP issue looks forward to what is necessary for Brett's special education from this point forward. And whether it was in there before or whether it was not, the School District has the burden of showing that he is being provided with an appropriate special education and the record here is that he is.

The question is can this additional course specific language be included and I don't think that the School District can be mandated to do so where the methodology could be learned by a course of four days of the program, and some hands-on experience or through different types of training.

This would be no different than telling a surgeon that he could not perform a particular surgical procedure unless he went to a particular course as opposed to learning it through apprenticeship and experience or telling a lawyer that he can't practice law if he doesn't go to a particular law school or doesn't take a particular [p. 10] class in law school. I mean we all know that you might not take administrative law in law school, which I didn't take, but I now think that I'm probably competent in administrative law and I think the same thing is true here.

So I'm going to reverse the decision of the hearing examiner and I don't know under the federal law whether findings of fact and conclusions of law are necessary in a reversal as they are under 1-26-36. Perhaps you can enlighten me, counsel.

MR. LUCE: Frankly, I do not know either.

MR. HAMILTON: I have not seen findings and conclusions done in this situation before.

MR. LUCE: Frankly, your Honor I think you've been specific enough in your ruling that your ruling itself could constitute those findings of facts should they become necessary but –

THE COURT: Well, if the – this isn't a 1-26 appeal and so my inclination would be to not go through the work since I've tried to be fairly specific.

But if you believe, Mr. Hamilton, as the non-prevailing party if you believe that they are necessary, you know I'll give you an opportunity to provide me some authority on that and we can do them if you can convince me that it's necessary.

[p. 11] The last thing I would say is that because I – because Mr. Koupal is not a prevailing party, under this Court's rulings, I would decline to award attorney fees unless you, within the next five days, notify me in writing that you want to provide authority that findings of fact and conclusions of law are necessary. I just ask then that the District submit an order incorporating my decision.

Any questions?

MR. LUCE: No, your Honor. I'll wait at least until next week then to submit any order in case John needs to present something.

MR. HAMILTON: Okay.

THE COURT: Thank you, counsel.

We'll be in recess.

(Conclusion of Judge Zinter's Oral Decision.)

STATE OF SOUTH DAKOTA	)	IN CIRCUIT
	) SS	COURT SIXTH
COUNTY OF HUGHES	)	JUDICIAL CIRCUIT

SIOUX FALLS SCHOOL DISTRICT,	*	CIV. 93-150
Plaintiff,	*	JUDGMENT (Filed Dec. 17, 1993)
vs.	*	
RENEE KOUPAL,	*	
Defendant.	*	

Plaintiff, having appealed the decision of the hearing examiner for the State Board of Education, Office of the State Superintendent, to this Court, and this Court having considered all of the files and records herein including the briefs submitted by both sides, and the Court having heard oral arguments of counsel on November 15, 1993, and the Court having issued its oral decision at that time and neither side having insisted upon any formal findings of fact or conclusions of law other than the oral statements made by the Court at the time of is decision; it is hereby

ORDERED, ADJUDGED AND DECREED that the decision of the hearing examiner is hereby reversed and judgment is entered in favor of the Plaintiff, Sioux Falls School District. It is specifically ORDERED, ADJUDGED AND DECREED that Brett Koupal's IEP should not include the language that his home base classroom

teacher will receive the five-day TEACCH training course prior to working with him.

It is also ORDERED, ADJUDGED AND DECREED that Defendant's counterclaim for attorney's fees is dismissed, with prejudice, the Court having entered its decision which does not result in the Defendant being the prevailing party, and therefore, the Defendant is not entitled to any award of attorney's fees.

Dated this 17 day of December , 1993.

BY THE COURT:

/s/ Steven L. Zinter
Judge

ATTEST:

/s/ Mary L. Erickson , CLERK

By /s/ Sharon McEntaffer
Deputy

State of South Dakota)
) ss
County of Hughes)

I hereby certify that the foregoing
instrument is a true and correct
copy of the original on file in my office.
Dated this 17th day of Dec. 19 93
MARY L. ERICKSON, Clerk of Courts
By /s/ Sharon McEntaffer
Clerk of Courts/Deputy

South Dakota

April 15, 1993

Sioux Falls Sch. Dist.

Hearing Examiner: Steven K. Rabuck.

The parent of a student with autism alleged that the district unilaterally excised language from the student's draft IEP requiring all of his teachers to particpate [sic] in a five-day TEACCH training course. TEACCH is a program of instruction targeted specifically for use with children who are autistic. The district had previously determined that the TEACCH model was appropriate as the basis for the student's educational program.

HELD: for the parent.

The hearing officer held that the district was estopped from arguing that the training course provision was not a part of the student's official IEP due to its failure to inform the parent that the disputed language had been deleted from the final version of the IEP. Moreover, the hearing officer determined that the district failed to demonstrate by a preponderance of the evidence that the training requirement was no longer necessary in order to provide an appropriate education to the student. Thus, the district was ordered to reinstate the training provision as part of the student's current IEP.

The matter of the due process hearing requested relating to the education of [ ] came on regularly for hearing before Steven K. Rabuck, duly appointed hearing examiner under the authority of the South Dakota Board

of Education, on March 26, 1993 at Instructional Planning Center, Sioux Falls, SD.

The parent of the child, [ ] appeared personally and was represented by John A. Hamilton, her attorney.

The Sioux Falls School District 49-5 appeared by and through Karen Roth, Director of Exceptional Children Services and was represented by Michael L. Luce, its attorney.

Both parties having presented evidence and argument relating to the following issue:

Whether [ ]'s home base classroom teacher will receive the five-day TEACCH training course prior to working with him. The Hearing Examiner hereby makes the following:

Findings of Fact

1. Steven K. Rabuck was duly appointed as Hearing Examiner in this case by ORDER DESIGNATING HEARING EXAMINER issued by John A. Bonaiuto, Ed.D., State Superintendent, Division of Education, on January 28, 1993.

2. Due notice was given to both parties on March 9, 1993 by sending notice to them, certified mail, return receipt requested, of the information contained in Hearing Examiner's Exhibit #2.

3. [ ] is an autistic child who requires and received special education due to his handicap.

4. The Sioux Falls School District conducted meetings on May 31, 1991 and February 19, 1992 for the purpose of developing I.E.P.s for [ ]. Both I.E.P.s included

typed pages with the heading "Other Related Services" which contained language that [ ]'s teachers would receive, at the very least, the five-day TEACCH training course prior to working with him. The typed pages were submitted by [ ]'s parent and are not incorporated in the printed I.E.P. forms used by the School District.

5. [ ]'s parent was not told by the School District that the language regarding the TEACCH course was excluded from the official I.E.P.'s formulated in 1991 and 1992.

6. [ ]'s parent contacted the School District in writing on May 15, 1992 objecting to [ ]'s summer school teacher not having the TEACCH course. The parent quoted the language requiring the TEACCH course from [ ]'s 1992 I.E.P.

7. The School District responded to parents' letter on May 28, 1992, stating that the summer school teacher would receive assistance from another teacher who had received the TEACCH course and would also attend the first day of TEACCH training. The School District did not deny that the TEACCH course requirement was part of [ ]'s official I.E.P. Moreover, the School District later arranged for the summer school teacher to attend all but six hours of the TEACCH course.

8. TEACCH is a program of instruction targeted for use with autistic children. The School District has stipulated that the TEACCH program is appropriate for [ ].

9. TEACCH or a similar educational program, used consistently, is essential for [ ] to benefit from special education.

10. The School District attempted to revise [ ]'s I.E.P. during the December 11, 1992 I.E.P. meeting by excluding the language requiring, at a minimum, that his teacher receive the five-day TEACCH course prior to working with him.

11. That the School District by failure to inform the parent that the disputed language was excluded from the 1991 and 1992 I.E.P.'s and by arranging for [ ]'s summer school teacher to receive all but six hours of the TEACCH course after parent objected based on the disputed language, is now estopped from arguing that this language was not part of the "official" I.E.P.

12. That an I.E.P. can be revised only when it is appropriate to do so, and the School District has failed to prove by a preponderance of the evidence that the proposed revision is appropriate.

13. That the Hearing Examiner makes such other and further findings of fact as are contained in the written Decision filed herewith.

Based on the foregoing FINDINGS OF FACT, the Hearing Examiner hereby makes the following:

Conclusions of Law

1. The parties received due, proper, and legal notice required in contested cases.

2. The Hearing Examiner has jurisdiction to determine the issue.

3. The language contained in the 1991 and 1992 I.E.P.s requiring that [ ]'s teachers receive, at a minimum, the five-day TEACCH course prior to working with him

is a related service required for [ ] to benefit from the special education, is essential for [ ] to receive a free appropriate public education, and it is not appropriate to revise his current I.E.P. by excluding this related service.

4. The Hearing Examiner does not have jurisdiction to award attorney fees.

5. The Hearing Examiner makes such other and further CONCLUSIONS OF LAW as are contained in the written Decision, filed herewith.

Decision

[ ] is a five year old child who is autistic. He receives special education provided by the Sioux Falls School District. I.E.P.'s were written for [ ] on May 31, 1991 and February 19, 1992. *Parent's Exhibits 3 and 4.* [ ]'s parent participated in formulating both I.E.P.s, and submitted typewritten documents with the heading "Other Related Services" containing language that required [ ]'s teachers to have, at a minimum, the five day TEACCH course prior to working with him. This document was attached to both I.E.P.s, and the Parent was not told that the School District considered this language excluded from the official I.E.P.

On May 15, 1992, Parent wrote a letter to School District objecting to [ ]'s summer school teacher not having the TEACCH course, and quoted the language from the I.E.P. requiring this training. *Parent's Ex.5.* School District responded by letter stating that [ ]'s summer school teacher would be assisted by another teacher who had TEACCH training, and that the summer school teacher would attend the first day of TEACCH training.

Parent's ex.#6. School District did not tell parent that this training was excluded from the I.E.P. *id.* [sic] School District then arranged for the summer school teacher to attend all but six hours of the TEACCH course. *tr.-p.71.*

School District agrees that the TEACCH system should be part of [ ]'s I.E.P., and that it wants [ ]'s teachers to have TEACCH training. *tr.,p.146.* School District also admits that the TEACCH system, or a similar system, must be used consistently for [ ] to benefit from special education. *tr., p.148.* In fact, School District testified that if [ ] did not have a teacher who could implement his program, he would regress. *tr., p.154.* [ ] needs more specific program considerations than a child with a less complex disorder. *tr., p.149.*

School District and parent held an I.E.P. meeting on December 11, 1992 and wrote [ ]'s current I.E.P. *Parent's Ex.12.* School District informed Parent that the language requiring [ ]'s teacher to have, at a minimum, the five-day TEACCH training course was not part of the "official" I.E.P. Parent then requested this hearing.

Two sub-issues must be resolved prior to reaching a decision in this case.

The first sub-issue is whether an I.E.P. can require a teacher to have training beyond state requirements for certification. It is undisputed that South Dakota does not require specific training in Autism prior to certification as a special education teacher.

It is also undisputed that a handicapped child must receive a free, appropriate public education which means special education and related services which are provided

in conformity with an I.E.P. which meets the requirements of federal regulations. 34 CFR § 300.4(d). I.E.P.s must include a statement of the specific special education and related services to be provided to a child. 34 CFR § 300.346(c). Related services means transportation and such developmental, corrective, and other supportive services as are required to assist a child to benefit from special education. 34 CFR § 300.13. The comment at the end of the regulation regarding related services provides that the list of services contained in the regulation is not exhaustive. *Id.* Related services is also defined by state regulation as services that support the provision of special education and include those developmental, corrective, and other supportive services determined to be required for a child to benefit from special education. ARSD 24:05:13:01(13).

Both federal and especially the state regulations defining related services are broad enough to include specific training over and above minimum certification requirements for a special education teacher. It is clear that [ ] requires the TEACCH or similar system, used consistently, to benefit from special education. [ ] will regress if a teacher unable to implement his program works with him.

Neither the federal or state regulations specifically allow teacher training over and above state certification requirements – nor do the regulations prohibit it. The School District has not cited any authority for its argument that additional teacher training cannot be part of an I.E.P. It is the opinion of the Hearing Examiner that in an appropriate case, such as this, additional training for teachers could be part of an I.E.P. as a related service;

especially when dealing with a complex disorder such as autism.

The second sub-issue is whether the language requiring, at a minimum, that [ ]'s teachers have the five-day TEACCH course prior to working with him was part of the "official" 1991 and 1992 I.E.P.s. This is significant because if the language was part of the 1991 and 1992 I.E.P.s, removing the language from his current I.E.P. would constitute a revision which can only be done if appropriate. 34 CFR § 300.343(d); ARSD 24:05:27:08. Any change in short-term objectives or amount of services constitutes a revision of the child's I.E.P. ARSD 24:05:27:09. In developing an I.E.P., the members of the placement committee must determine if any developmental, corrective, or other supportive services are required to assist a child to benefit from special education. These services must be written into the I.E.P. as related services. ARSD 24:05:27:03.

The disputed training requirement was included in [ ]'s past I.E.P.s as "other related services." Parent provided the writing, and was not told that the "other related service" was excluded from the I.E.P. Most significantly, when [ ]'s parent objected to his summer school teacher not having TEACCH training, School District did not tell Parent that this training was excluded from the I.E.P. and eventually arranged for the summer school teacher to receive all but six hours of the TEACCH training.

It appears that there was some confusion regarding what was in or out of the I.E.P., *i.e.*, what were "suggestions" as opposed to "official" I.E.P. language. However,

it is my opinion that based on the School District's actions, it is estopped from now arguing that the training requirement was not part of the related services portion of the I.E.P. Further, the School District has not proven by a preponderance of the evidence that this language was not part of the old I.E.P.s.

The School District has also failed to prove by a preponderance of the evidence that revising [ ]'s current I.E.P. by excluding the training requirement is appropriate. Thus, the training requirement must remain.

The Hearing Examiner does not have jurisdiction to award attorney fees.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * *

SIOUX FALLS SCHOOL DISTRICT,	)	**ORDER DENYING REHEARING**
Plaintiff and Appellee,	)	**#18670**
vs.	)	
RENEE KOUPAL,	)	**(Filed Jan. 25, 1995)**
Defendant and Appellant.	)	

A petition for rehearing in the above cause having been filed January 9, 1995, and no issue or question of law or fact appearing to have been overlooked or misapprehended, and more than fifteen days having elapsed therefrom and no written statement having been filed with the Clerk of this Court by a majority of the justices thereof requesting a rehearing, now, therefore, in accordance with the Rehearing Procedure Rule of this Court, the petition for rehearing is denied.

DATED at Pierre, South Dakota, January 25, 1995.

BY THE COURT:

/s/ Robert A. Miller
Robert A. Miller,
Chief Justice

ATTEST:

/s/ Gloria J. Engel
Clerk of the Supreme Court
(SEAL)

EDUCATION OF INDIVIDUALS WITH DISABILITIES

20 U.S.C. Chapter 33

SUBCHAPTER I – GENERAL PROVISIONS

Sec. 1400 Congressional statements and declarations

(a) Short title

This chapter may be cited as the "Individuals with Disabilities Education Act".

(b) Findings

The Congress finds that –

(1) there are more than eight million children with disabilities in the United States today;

(2) the special educational needs of such children are not being fully met;

(3) more than half of the children with disabilities in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;

(4) one million of the children with disabilities in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;

(5) there are many children with disabilities throughout the United States participating in regular school programs whose disabilities prevent them from having a successful educational experience because their disabilities are undetected;

(6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense;

(7) developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide effective special education and related services to meet the needs of children with disabilities;

(8) State and local educational agencies have a responsibility to provide education for all children with disabilities, but present financial resources are inadequate to meet the special educational needs of children with disabilities; and

(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of children with disabilities in order to assure equal protection of the law.

(c) Purpose

It is the purpose of this chapter to assure that all children with disabilities have available to them, within the time periods specified in Sec. 1412(2)(B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their parents or guardians are protected, to assist States and localities to provide for the education of all children with disabilities, and to assess and assure

the effectiveness of efforts to educate children with disabilities.

(Pub. L. 91-230, title VI, Sec. 601, Apr. 13, 1970, 84 Stat. 175; Pub. L. 94-142, Sec. 3(a), Nov. 29, 1975, 89 Stat. 774; Pub. L. 101-476, title IX, Sec. 901(a)(1), (b)(1)-(9), Oct. 30, 1990, 104 Stat. 1141, 1142; Pub. L. 102-119, Sec. 25(b), Oct. 7, 1991, 105 Stat. 607.)

Sec. 1401 Definitions

(a) As used in this chapter –

(1)(A) The term "children with disabilities" means children –

(i) with mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and

(ii) who, by reason thereof, need special education and related services.

(B) The term "children with disabilities" for children aged 3 to 5, inclusive, may, at a State's discretion, include children –

(i) experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas: physical development, cognitive development, communication development, social or emotional development, or adaptive development; and

(ii) who, by reason thereof, need special education and related services.

(2) Repealed

Pub. L. 98-199, Sec. 2(2), Dec. 2, 1983, 97 Stat. 1357.

(3) Repealed

Pub. L. 100-630, title I, Sec. 101(a)(2), Nov. 7, 1988, 102 Stat. 3289.

(4) The term "construction," except where otherwise specified, means

(A) erection of new or expansion of existing structures, and the acquisition and installation of equipment therefor; or

(B) acquisition of existing structures not owned by any agency or institution making application for assistance under this chapter; or

(C) remodeling or alteration (including the acquisition, installation, modernization, or replacement of equipment) of existing structures; or

(D) acquisition of land in connection with activities in clauses (A), (B), and (C); or

(E) a combination of any two or more of the foregoing.

(5) The term "equipment" includes machinery, utilities, and built-in equipment and any necessary enclosures or structures to house them, and includes all other items necessary for the functioning of a particular facility as a facility for the provision of educational services,

including items such as instructional equipment and necessary furniture, printed, published, and audio-visual instructional materials, telecommunications, sensory, and other technological aids and devices, and books, periodicals, documents, and other related materials.

(6) The term "State" means any of the several States, the District of Columbia, the Commonwealth of the Northern Mariana Islands, or Palau (until the Compact of Free Association with Palau takes effect pursuant to Sec. 101(a) of Public Law 99-658).

(7) The term "State educational agency" means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.

(8) The term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term also includes any other public institution or agency having administrative control and direction of a public elementary or secondary school.

(9) The term "elementary school" means a day or residential school which provides, elementary education, as determined under State law.

(10) The term "secondary school" means a day or residential school which provides secondary education, as determined under State law, except that it does not include any education provided beyond grade 12.

(11) The term "institution of higher education" means an educational institution in any State which –

(A) admits as regular students only individuals having a certificate of graduation from a high school, or the recognized equivalent of such a certificate;

(B) is legally authorized within such State to provide a program of education beyond high school;

(C) provides an educational program for which it awards a bachelor's degree, or provides not less than a two-year program which is acceptable for full credit toward such a degree, or offers a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semiprofessional level in engineering, scientific, or other technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge;

(D) is a public or other nonprofit institution; and

(E) is accredited by a nationally recognized accrediting agency or association listed by the Secretary pursuant to this paragraph or, if not so accredited, is an institution whose credits are accepted, on transfer, by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited: Provided, however, That in the case of

an institution offering a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semi-professional level in engineering, scientific, or technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge, if the Secretary determines that there is no nationally recognized accrediting agency or association qualified to accredit such institutions, the Secretary shall appoint an advisory committee, composed of persons specially qualified to evaluate training provided by such institutions, which shall prescribe the standards of content, scope, and quality which must be met in order to qualify such institutions to participate under this Act and shall also determine whether particular institutions meet such standards. For the purposes of this paragraph the Secretary shall publish a list of nationally recognized accrediting agencies or associations which the Secretary determines to be reliable authority as to the quality of education or training offered.

The term includes community colleges receiving funding from the Secretary of the Interior under the Tribally Controlled Community College Assistance Act of 1978 [25 U.S.C. 1801 et seq.].

(12) The term "nonprofit" as applied to a school, agency, organization, or institution means a school, agency, organization, or institution owned and operated by one or more nonprofit corporations or associations no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

(13) The term "research and related purposes" means research, research training (including the payment of stipends and allowances), surveys, or demonstrations in the field of education of children with disabilities, or the dissemination of information derived therefrom, including (but without limitation) experimental schools.

(14) The term "Secretary" means the Secretary of Education.

(15) The term "children with specific learning disabilities" means those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include children who have learning problems which are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability, including –

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) instruction in physical education.

(17) The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

(18) The term "free appropriate public education" means special education and related services that –

(A) have been provided at public expense, under public supervision and direction, and without charge,

(B) meet the standards of the State educational agency,

(C) include an appropriate preschool, elementary, or secondary school education in the State involved, and

(D) are provided in conformity with the individualized education program required under Sec. 1414(a)(5) of this title.

(19) The term "transition services" means a coordinated set of activities for a student, designed within an outcome-oriented process, which promotes movement from school to post-school activities, including post-secondary education, vocational training, integrated

employment (including supported employment), continuing and adult education, adult services, independent living, or community participation. The coordinated set of activities shall be based upon the individual student's needs, taking into account the student's preferences and interests, and shall include instruction, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation.

(20) The term "individual education program" means a written statement for each child with a disability developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include –

(A) a statement of the present levels of educational performance of such child,

(B) a statement of annual goals, including short-term instructional objectives,

(C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs,

(D) a statement of the needed transition services for students beginning no later than age 16 and annually thereafter (and, when determined appropriate for the

individual, beginning at age 14 or younger), including when appropriate, a statement of the interagency reponsibilities[1] or linkages (or both) before the student leaves the school setting,

(E) the projected date for initiation and anticipated duration of such services, and

(F) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

In the case where a participating agency, other than the educational agency, fails to provide agreed upon services, the educational agency shall reconvene the IEP team to identify alternative strategies to meet the transition objectives.

(21) The term "excess costs" means those costs which are in excess of the average annual per student expenditure in a local educational agency during the preceding school year for an elementary or secondary school student, as may be appropriate, and which shall be computed after deducting –

(A) amounts received –

(i) under this subchapter,

(ii) under chapter 1 of title I of the Elementary and Secondary Education Act of 1965 [20 U.S.C. 2701 et seq.], or

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[1] So in orginal. Probably should be "responsibilities".

(iii) under title VII of the Elementary and Secondary Education Act of 1965 [20 U.S.C. 328 et seq.], and

(B) any State or local funds expended for programs that would qualify for assistance under such subchapter, chapter, or title.

(22) The term "native language" has the meaning given that term by Sec. 7003(a)(2) of the Bilingual Education Act. See Reference in Text note below.

(23) The term "intermediate educational unit" means any public authority, other than a local educational agency, which is under the general supervision of a State educational agency, which is established by State law for the purpose of providing free public education on a regional basis, and which provides special education and related services to children with disabilities within that State.

(24)(A) The term "public or private nonprofit agency or organization" includes an Indian tribe and the Bureau of Indian Affairs of the Department of the Interior (when acting on behalf of schools operated by the Bureau for children and students on Indian reservations) and tribally controlled schools funded by the Department of the Interior.

(B) The terms "Indian", "American Indian", and "Indian American" mean an individual who is a member of an Indian tribe.

(C) The term "Indian tribe" means any Federal or State Indian tribe, band, rancheria, pueblo, colony, or community, including any Alaskan native village or regional village corporation (as defined in or established

under the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.]).

(25) The term "assistive technology device" means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve functional capabilities of individuals with disabilities.

(26) The term "assistive technology service" means any service that directly assists an individual with a disability in the selection, acquisition, or use of an assistive technology device. Such term includes –

(A) the evaluation of the needs of an individual with a disability, including a functional evaluation of the individual in the individual's customary environment;

(B) purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by individuals with disabilities;

(C) selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing of assistive technology devices;

(D) coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;

(E) training or technical assistance for an individual with disabilities, or, where appropriate, the family of an individual with disabilities; and

(F) training or technical assistance for professionals (including individuals providing education and rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of individuals with disabilities.

(27) The term "underrepresented" means populations such as minorities, the poor, the limited English proficient, and individuals with disabilities.

(b) "Youth with a disability" defined

For purposes of subchapter III of this chapter, "youth with a disability" means any child with a disability (as defined in subsection (a)(1) of this section) who –

(1) is twelve years of age or older; or

(2) is enrolled in the seventh or higher grade in school.

(Pub. L. 91-230, title VI, Sec. 602, Apr. 13, 1970, 84 Stat. 175; Pub. L. 94-142, Sec. 4(a), Nov. 29, 1975, 89 Stat. 775; Pub. L. 98-199, Secs. 2, 3(b), Dec. 2, 1983, 97 Stat. 1357, 1358; Pub. L. 99-457, title IV, Sec. 402, Oct. 8, 1986, 100 Stat. 1172; Pub. L. 100-630, title I, Sec. 101(a), Nov. 7, 1988, 102 Stat. 3289; Pub. L. 101-476, title I, Sec. 101, title IX, Sec. 901(b)(10)-(20), Oct. 30, 1990, 104 Stat. 1103, 1142; Pub. L. 102-73, title VIII, Sec. 802(d)(1), July 25, 1991, 105 Stat. 361; Pub. L. 102-119, Secs. 3, 25(a)(1), (2), (b), Oct. 7, 1991, 105 Stat. 587.)

Sec. 1412 Eligibility requirements

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

(1) The State has in effect a policy that assures all children with disabilities the right to a free appropriate public education.

* * *

Sec. 1413 State plans

(a) Requisite features

Any State meeting the eligibility requirements set forth in Sec. 1412 of this title and desiring to participate in the program under this subchapter shall submit to the Secretary, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information, as the Secretary deems necessary. Each such plan shall –

(1) set forth policies and procedures designed to assure that funds paid to the State under this subchapter will be expended in accordance with the provisions of this subchapter, with particular attention given to the provisions of Secs. 1411(b), 1411(c), 1411(d), 1412(2), and 1412(3) of this title;

(2) provide that programs and procedures will be established to assure that funds received by the State or any of its political subdivisions under any other Federal

program, including subpart 2 of part D of chapter 1 of title I of the Elementary and Secondary Education Act of 1965 [20 U.S.C. 2791 et seq.], under which there is specific authority for the provision of assistance for the education of children with disabilities, will be utilized by the State, or any of its political subdivisions, only in a manner consistent with the goal of providing a free appropriate public education for all children with disabilities, except that nothing in this clause shall be construed to limit the specific requirements of the laws governing such Federal programs;

(3) describe, consistent with the purposes of this chapter and with the comprehensive system of personnel development described in Sec. 1476(b)(8) of this title, a comprehensive system of personnel development that shall include –

(A) a description of the procedures and activities the State will undertake to ensure an adequate supply of qualified special education and related services personnel, including –

(i) the development and maintenance of a system for determining, on an annual basis –

(I) the number and type of personnel, including leadership personnel, that are employed in the provision of special education and related services, by area of specialization, including the number of such personnel who are employed on an emergency, provisional, or other basis, who do not hold appropriate State certification or licensure; and

(II) the number and type of personnel, including leadership personnel, needed, and a projection of the numbers of such personnel that will be needed in five years, based on projections of individuals to be served, retirement and other leaving of personnel from the field, and other relevant factors;

(ii) the development and maintenance of a system for determining, on an annual basis, the institutions of higher education within the State that are preparing special education and related services personnel, including leadership personnel, by area of specialization, including –

(I) the numbers of students enrolled in such programs, and

(II) the number who graduated with certification or licensure, or with credentials to qualify for certification or licensure, during the past year; and

(iii) the development, updating, and implementation of a plan that –

(I) will address current and projected special education and related services personnel needs, including the need for leadership personnel; and

(II) coordinates and facilitates efforts among State and local educational agencies, institutions of higher education, and professional associations to recruit, prepare, and retain qualified personnel, including personnel from minority backgrounds, and personnel with disabilities; and

(B) a description of the procedures and activities the State will undertake to ensure that all personnel

necessary to carry out this subchapter are appropriately and adequately prepared, including –

(i) a system for the continuing education of regular and special education and related services personnel;

(ii) procedures for acquiring and disseminating to teachers, administrators, and related services personnel significant knowledge derived from education research and other sources; and

(iii) procedures for adopting, where appropriate, promising practices, materials, and technology.

* * *

Sec. 1415 Procedural safeguards

(a) Establishment and maintenance

Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that children with disabilities and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

(b) Required procedures; hearing

(1) The procedures required by this section shall include, but shall not be limited to –

(A) an opportunity for the parents or guardian of a child with a disability to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit –

(i) proposes to initiate or change, or

(ii) refuses to initiate or change, the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully informs the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

(c) Review of local decision by State educational agency

If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

(d) Enumeration of rights accorded parties to hearings

Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded –

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities,

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses,

(3) the right to a written or electronic verbatim record of such hearing, and

(4) the right to written findings of fact and decisions (which findings and decisions shall be made available to the public) consistent with the requirements of Sec. 1417(c) of this title and shall also be transmitted to the advisory panel established pursuant to Sec. 1414(a)(12) of this title.

(e) Civil action; jurisdiction

(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3)(A) Except as provided in subparagraph (B), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(B)(i) Except as provided in clause (iii), if the proceedings conducted pursuant to this section involve a child with a disability who is determined to have brought a weapon to school under the jurisdiction of such agency, then the child may be placed in an interim alternative educational setting, in accordance with State law, for not more than 45 days.

(ii) The interim alternative educational setting described in clause (i) shall be decided by the individuals described in sec. 602(a)(20). (IEP team)

(iii) If a parent or guardian of a child described in clause (i) requests due process hearing pursuant to paragraph (2) of subsection (b), then the child shall remain in the alternative educational setting described in such clause during the pendency of any proceedings conducted pursuant to this section, unless the parents and the local educational agency agree otherwise.

(iv) For the purpose of this section, the term 'weapon' means a firearm as such term is defined in section 921 of title 18, United States Code.

(2) *EFFECTIVE DATE.* – Paragraph amendments made by paragraph (1) shall be effective during the period beginning on the date of enactment of this Act and ending on the date of enactment of an Act (enacted after the date of the enactment of this Act) that reauthorizes the Individuals with Disabilities Education Act.[1]

(b) *LIMITATION.* – Nothing in the Individuals with Disabilities Education Act shall supersede the provisions of section 14601 of the Elementary and Secondary Education Act if a child's behavior is unrelated to such child's disability, except that this section shall be interpreted in a manner that is consistent with the Department's final guidance concerning State and local responsibilities under the Gun-Free Schools Act of 1994.[2]

(4)(A) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

(B) In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a child or youth with a disability who is the prevailing party.

(C) For the purpose of this subsection, fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus

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[1] So in original.

[2] So in original.

or multiplier may be used in calculating the fees awarded under this subsection.

(D) No award of attorneys' fees and related costs may be made in any action or proceeding under this subsection for services performed subsequent to the time of a written offer of settlement to a parent or guardian, if –

(i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than ten days before the proceeding begins;

(ii) the offer is not accepted within ten days; and

(iii) the court or administrative officer finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.

(E) Notwithstanding the provisions of subparagraph (D), an award of attorneys' fees and related costs may be made to a parent or guardian who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Whenever the court finds that –

(i) the parent or guardian, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, experience, and reputation; or

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding, the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this subsection.

(G) The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(f) Effect on other laws

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973 [29 U.S.C. 790 et seq.], or other Federal statutes protecting the rights of children and youth with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (b)(2) and (c) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

(Pub. L. 91-230, title VI, Sec. 615, as added Pub. L. 94-142, Sec. 5(a), Nov. 29, 1975, 89 Stat. 788 and amended Pub. L. 99-372, Secs. 2, 3, Aug. 5, 1986, 100 Stat. 796, 797; Pub. L. 100-630, title I, Sec. 102(e), Nov. 7, 1988, 102 Stat. 3294; Pub. L. 101-476, title IX, Sec. 901(b)(71)-(75), Oct. 30, 1990, 104 Stat. 1145; Pub. L. 102-119, Sec. 25(b), Oct. 7, 1991, 105 Stat. 607.)

29 U.S.C. Sec. 794

Sec. 794 Nondiscrimination under Federal grants and programs; promulgation of rules and regulations

(a) No otherwise qualified individual with a disability in the United States, as defined in Sec. 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) For the purposes of this section, the term "program or activity" means all of the operations of –

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity)

to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in Sec. 2891(12) of title 20), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship –

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of

providing he services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) The standard used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under subchapter I of chapter 126 of title 42 and the provisions of Secs. 12201-12204, and 12210 of title 42, as such sections relate to employment.

(Pub. L. 93-112, title V, Sec. 504a, Sept. 26, 1973, 87 Stat. 394; Pub. L. 95-602, title I, Secs. 119, 122(d)(2), Nov. 6, 1978, 92 Stat. 2982, 2987; Pub. L. 99-506, title I, Sec. 103(d)(2)(B), title X, Sec. 1002(e)(4), Oct. 21, 1986, 100 Stat. 1810, 1844; Pub. L. 100-259, Sec. 4, Mar. 22, 1988, 100 Stat. 29; Pub. L. 100-630, title II, Sec. 206(d), Nov. 7, 1988, 102 Stat. 3312; Pub. L. 102-569, title I, Sec. 102(p)(32), title V, Sec. 506, Oct. 29, 1992, 106 Stat. 4360, 4428.)

* * *

23. Free appropriate public education

Under 104.33(a), a recipient is responsible for providing a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction. The word "in" encompasses the concepts of both domicile and actual residence. If a recipient places a child in a program other than its own, it remains financially responsible for the child, whether or not the other program is operated by another recipient or educational agency. Moreover, a recipient may not place a child in a program that is inappropriate or that otherwise violates the requirements of Subpart D. And in no case may a recipient refuse to provide services to a handicapped child in its jurisdiction because of another person's or entity's failure to assume financial responsibility.

Sec. 104.33(b) concerns the provision of appropriate educational services to handicapped children. To be appropriate, such services must be designed to meet handicapped children's individual educational needs to the same extent that those of nonhandicapped children are met. An appropriate education could consist of education in regular classes, education in regular classes with the use of supplementary services, or special education and related services. Special education may include specially designed instruction in classrooms, at home, or in private or public institutions and may be accompanied by such related services as developmental, corrective, and

other supportive services (including psychological, counseling, and medical diagnostic services). The placement of the child must however, be consistent with the requirements of 104.34 and be suited to his or her educational needs.

The quality of the educational services provided to handicapped students must equal that of the services provided to nonhandicapped students; thus, handicapped student's teachers must be trained in the instruction of person with the handicap in question and appropriate materials and equipment must be available. The Department is aware that the supply of adequately trained teachers may, at least at the outset of the imposition of this requirement, be insufficient to meet the demand of all recipients. This factor will be considered in determining the appropriateness of the remedy for noncompliance with this section. A new 104.33(b)(2) has been added, which allows this requirement to be met through the full implementation of an individualized education program developed in accordance with the standards of the EHA.

Paragraph (c) of 104.33 sets forth the specific financial obligations of a recipient. If a recipient does not itself provide handicapped persons with the requisite services, it must assume that cost of any alternate placement. If, however, a recipient offers adequate services and if alternate placement is chosen by a student's parent or guardian, the recipient need not assume the cost of the outside services. (If the parent or guardian believes that his or her child cannot be suitably educated in the recipient's program, he or she may make use of the procedures established in 104.36.) Under this paragraph, a recipient's

obligation extends beyond the provision of tuition payments in the case of placement outside the regular program. Adequate transportation must also be provided. Recipients must also pay for psychological services and those medical services necessary for diagnostic and evaluative purposes.

If the recipient places a student, because of his or her handicap, in a program that necessitates his or her being away from home, the payments must also cover room and board and nonmedical care (including custodial and supervisory care). When residential care is necessitated not by the student's handicap but by factors such as the student's home conditions, the recipient is not required to pay the cost of room and board.

Two new sentences have been added to paragraph (c)(1) to make clear that a recipient's financial obligations need not be met solely through its own funds. Recipients may rely on funds from any public or private source including insurers and similar third parties.

The EHA requires a free appropriate education to be provided to handicapped children "no later than September 1, 1978," but Sec. 504 contains no authority for delaying enforcement. To resolve this problem, a new paragraph (d) has been added to 104.33. Sec. 104.33(d) requires recipients to achieve full compliance with the free appropriate public education requirements of 104.33 as expeditiously as possible, but in no event later than September 1, 1978. The provision also makes clear that, as of the effective date of this regulation, no recipient may

exclude a qualified handicapped child from its educational program. This provision against exclusion is consistent with the order of providing services set forth in Sec. 612(3) of the EHA, which places the highest priority on providing services to handicapped children who are not receiving an education.

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INDIVIDUALIZED EDUCATION PROGRAMS (IEPs)

Interpretation of Requirements of Part B of the Individuals With Disabilities Education Act

I. Purpose of the IEP

There are two main parts of the IEP requirement, as described in the Act and regulations:

(1) The IEP meeting(s), where parents and school personnel jointly make decisions about an educational program for a child with a disability, and

(2) the IEP document itself, that is, a written record of the decisions reached at the meeting. The overall IEP requirement, comprised of these two parts, has a number of purposes and functions:

a. The IEP meeting serves as a communication vehicle between parents and school personnel, and enables them, as equal participants, to jointly decide what the child's needs are, what services will be provided to meet those needs, and what the anticipated outcomes may be.

b. The IEP process provides an opportunity for resolving any differences between the parents and the agency concerning the special education needs of a child with a disability; first, through the IEP meeting, and second, if necessary, through the procedural protections that are available to the parents.

c. The IEP sets forth in writing a commitment of resources necessary to enable a child with a disability to receive needed special education and related services.

d. The IEP is a management tool that is used to ensure that each child with a disability is provided special education and related services appropriate to the child's special learning needs.

e. The IEP is a compliance/monitoring document that may be used by authorized monitoring personnel from each governmental level to determine whether a child with a disability is actually receiving the FAPE agreed to by the parents and the school.

f. The IEP serves as an evaluation device for use in determining the extent of the child's progress toward meeting the projected outcomes.

Note: The Act does not require that teachers or other school personnel be held accountable if a child with a disability does not achieve the goals and objectives set forth in the IEP. See Sec. 300.350, Individualized education program – accountability.

Sec. 300.139 Comprehensive system of personnel development

Each State plan must include the procedures required under Secs. 300.380-300.383.

(Authority: 20 U.S.C. 1413(a)(3))

Sec. 300.224 Personnel Development

Each application must include procedures for the implementation and use of the comprehensive system of personnel development established by the SEA under Sec. 300.139.

(Authority: 20 U.S.C. 1414(a)(1)(C)(i))

Sec. 300.308 Assistive technology

Each public agency shall ensure that assistive technology devices or assistive technology services, or both, as those terms are defined in Secs. 300.5-300.6, are made available to a child with a disability if required as a part of the child's –

(a) Special education under Sec. 300.17;

(b) Related services under Sec. 300.16; or

(c) Supplementary aids and services under Sec. 300.550(b)(2).

(Authority: 20 U.S.C. 1412(2), (5)(B))

Sec. 300.343 Meetings

(a) General

Each public agency is responsible for initiating and conducting meetings for the purpose of developing,

reviewing, and revising the IEP of a child with a disability (or, if consistent with State policy and at the discretion of the LEA, and with the concurrence of the parents, an individualized family service plan described in section 677(d) of the Act for each child with a disability, aged 3 through 5).

(b) [Reserved]

(c) Timeline

A meeting to develop an IEP for a child must be held within 30 calendar days of a determination that the child needs special education and related services.

(d) Review

Each public agency shall initiate and conduct meetings to review each child's IEP periodically and, if appropriate, revise its provisions. A meeting must be held for this purpose at least once a year.

(Authority: 20 U.S.C. 1412(2)(B), (4), (6); 1414(a)(5))

Comprehensive System of Personnel Development

Sec. 300.381 Adequate supply of qualified personnel

Each State plan must include a description of the procedures and activities the State will undertake to ensure an adequate supply of qualified personnel (as the

term "qualified" is defined at Sec. 300.15), including special education and related services personnel and leadership personnel, necessary to carry out the purposes of this part. The procedures and activities must include the development, updating, and implementation of a plan that –

(a) Addresses current and projected special education and related services personnel needs, including the need for leadership personnel; and

(b) Coordinates and facilitates efforts among SEA and LEAs, institutions of higher education, and professional associations to recruit, prepare, and retain qualified personnel, including personnel from minority backgrounds, and personnel with disabilities.

(Authority: 20 U.S.C. 1413(a)(3)(A))

Sec. 300.382 Personnel preparation and continuing education

Each State plan must include a description of the procedures and activities the State will undertake to ensure that all personnel necessary to carry out this part are appropriately and adequately prepared. The procedures and activities must include –

(a) A system for the continuing education of regular and special education and related services personnel to enable these personnel to meet the needs of children with disabilities under this part;

(b) Procedures for acquiring and disseminating to teachers, administrators, and related services personnel

significant knowledge derived from education research and other sources; and

(c) Procedures for adopting, if appropriate, promising practices, materials, and technology, proven effective through research and demonstration.

(Authority: 20 U.S.C. 1413(a)(3)(B))

Sec. 302.51 What are allowable costs under this program?

(a) Funds provided under this part may be used for programs and projects including, but not limited to –

(1) Services provided in early intervention, preschool, elementary, secondary, and transition programs;

(2) Acquisition of equipment and instructional materials, and telecommunications, sensory, and other technological aids and devices;

(3) Employment of special personnel;

(4) Training and employment of educational aides;

(5) Training in the use and provision of assistive devices and other specialized equipment;

(6) Training of teachers and other personnel;

(7) Training of parents of handicapped infants, toddlers, and children;

(8) Training of nonhandicapped children to facilitate their participation with handicapped infants, toddlers, and children in joint activities;

(9) Training of employers and independent living personnel involved in assisting the transition of handicapped children from school to work and independent living;

(10) Outreach activities to involve handicapped infants, toddlers, and children and their families more fully in a wide range of educational and recreational activities in their communities;

(11) Planning for, evaluating, and disseminating information about the programs and projects funded under this part.

(b) Funds under this part may not be used for the payment of tuition and fees unless the tuition and fees are associated with activities and services other than –

(1) Special education and related services that are specified in a handicapped child's IEP under Part B of the EHA; or

(2) Early intervention services that are specified in a handicapped infant's or toddler's IFSP under part H of the EHA.

(Authority: 20 U.S.C. 2791(b), 2792(b), 2793.)